Supreme Court, U.S.
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No. 05-___

In The

Supreme Court of the United States

JACKIE DEMPÉRE,

Petitioner,

v.

THE CITY OF TUKWILA,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Court Of Appeals, Division I

PETITION FOR A WRIT OF CERTIORARI

NEIL M. FOX
Attorney for Petitioner
COHEN & IARIA
1008 Western Ave., Suite 302
Seattle, WA 98104

Phone: (206) 624-9694
Fax: (206) 624-9691
e-mail: nmf@cohen-iaria.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether, under *Houston v. Hill*, 482 U.S. 451 (1987), a person can be constitutionally convicted of obstructing a police officer, when she verbally challenges the officer's illegal arrest of a third person, even if such verbal challenge actually interferes with the officer's actions?

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PETITION FOR WRIT OF CERTIORARI

Jackie Dempére petitions for a writ of certiorari to the Washington Court of Appeals, Division I, in *In the Matter of the Personal Restraint of Jackie Dempére*, No. 52925-1-I.

OPINIONS BELOW

The unpublished opinion of the Washington Court of Appeals issued on October 18, 2004, and is reported at 123 Wn. App. 1046 (2004). It is reprinted at App. 1a-18a. The Washington Court of Appeals denied a motion for reconsideration on December 8, 2004. A copy of that order is reproduced at App. 19a. In an unpublished order, issued on February 24, 2005, the Commissioner of the Washington Supreme Court denied discretionary review. A copy of the ruling is reproduced at App. 20a-23a. In an unpublished order entered on May 3, 2005, the Washington Supreme Court denied a Motion to Modify the Commissioner's Ruling. A copy of this order is reproduced at App. 24a. The judgment imposed by the trial court and the trial court's rulings are unpublished and are reproduced at App. 25a-36a.

STATEMENT OF JURISDICTION

The Washington Supreme Court entered its Order denying Petitioner's Motion to Modify the Commissioner's Ruling which denied review on May 3, 2005. App. 24a. This Court has jurisdiction under 28 U.S.C. § 1257(a). 28 U.S.C. § 2403(b) may apply in this case. Although the City of Tukwila is a political subdivision of the State of Washington, Petitioner is serving a copy of her petition on the

Attorney General of the State of Washington pursuant to Rule 29(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the United States Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

The Revised Code of Washington (RCW), § 9A.76.020, provides in relevant part: "A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties."

The Municipal Code of the City of Tukwila, Washington, § 8.60.020, provides in relevant part: "The following RCW statutes of the State of Washington are adopted by reference: . . . RCW § 9A.76.020 Obstructing a law enforcement officer."

STATEMENT OF THE CASE

1. One night in October 1998, police in Tukwila, Washington, were sent out to the scene of a possible fight at an apartment building. When the officers arrived, they discovered a large group of people milling around and contacted a man who turned out to be the victim. Because the man was "a little hysterical," the first officer on the scene placed him in handcuffs. App. 3a-4a. Other officers noted a man named Ramon Garza walking nearby with his hands inside his bulky jacket. The officers recognized him from prior encounters and ordered him to remove his hands from his pockets. When Mr. Garza refused, the officers grabbed him and a struggle ensued. Mr. Garza ended up on the ground, with officers on his neck and back. The officers and Mr. Garza gave different accounts about the amount of force the police used, and how much Mr. Garza actually resisted arrest, although the police agreed that they sprayed Mr. Garza with pepper spray while he was in the patrol car, handcuffed. App. 4a-6a.

Jackie Dempére, the petitioner, lived near the scene of the arrest and was working on the locks of her house when she heard a loud scream. Still holding her screwdriver, she went out to the street and saw an officer using his knee to hold Garza's head down, while he was handcuffed. She was concerned that Garza would be injured or paralyzed. The officers told Ms. Dempére to move across the street. The officers claimed that Ms. Dempére disobeyed them and came close to the arrest scene, yelling "this is America" and that she "can do what she wants to do." Ms. Dempére maintained she complied with the order to move back, and merely told the officers that they were hurting Garza. App. 4a-6a. Ultimately, one of the officers arrested

Ms. Dempére. He claimed that because of her "interference," he "had to break away repeatedly from assisting with Garza and investigating the reported disturbance." App. 4a.

The City of Tukwila charged Ms. Dempére in its municipal court with the gross misdemeanor of Obstructing a Law Enforcement Officer in violation of RCW § 9A.76.020 (adopted by reference by Tukwila Municipal Code § 8.60.020). The case proceeded to jury trial, but it ended in a mistrial. App. 3a.

At the conclusion of the second trial, the judge instructed the jury that: "Absent a threat of serious bodily injury to the arrestee, a person is prohibited from interfering with an arrest made by a uniformed police officer." Instruction No. 5, App. 33a. Ms. Dempére's attorney excepted to the giving of this instruction, in part, on First Amendment grounds:

> And therefore if nothing else it constitutes where words may constitute the only interference a charge to the jury that does not take into consideration first amendment rights and therefore by its own broad based definition embraces speech, embraces first amendment rights, constitutes a prior restraint and cannot be used.

App. 35a.

2. Ms. Dempére was convicted and sentenced to jail, probation, community service and a fine. App. 25a-28a. After her conviction was affirmed on direct appeal, the

municipal court modified the sentence to eliminate probation, community service and any additional jail time.[1] App. 29a-32a. Ms. Dempére has paid off the fine. She therefore may not be "in custody" for purposes of filing a writ of habeas corpus in federal court. *See* 28 U.S.C. § 2241(c)(3).

3. After losing the direct appeal, Ms. Dempére filed a Personal Restraint Petition in the Washington Court of Appeals. She asked the Court of Appeals to reconsider the earlier rulings on direct appeal regarding Instruction No. 5, arguing that the prior rulings failed to consider adequately the First Amendment or the holdings of *Houston v. Hill*, 428 U.S. 451 (1987) and *Gulliford v. Pierce County*, 136 F.3d 1345 (9th Cir. 1998). App. 41a-46a. Ms. Dempére also argued that there was insufficient evidence to sustain a conviction under the Fourteenth Amendment because the police illegally arrested Mr. Garza, who was suspected of committing no crime, in violation of the Fourth Amendment. App. 37a-41a.

The Washington Court of Appeals refused to review the instructional issue because the issue had been raised on direct appeal. App. 15a-17a. The Court of Appeals also held there was sufficient evidence to sustain the conviction, without addressing the Fourth Amendment issues. App. 11a-13a.

4. Ms. Dempére sought discretionary review of this decision in the Washington Supreme Court, arguing, *inter alia*, that jury instructions violated the First Amendment and *Houston v. Hill*, *supra*, and that there was insufficient evidence under the Fourteenth Amendment because the

[1] The judge sentenced Ms. Dempére to spend one day in jail, which she had already served upon her arrest.

police did not have the right under the Fourth Amendment to arrest Mr. Garza. App. 47a-50a. The Supreme Court Commissioner rejected her arguments. App. 20a-23a. Ms. Dempére moved to modify, again raising arguments under the First, Fourth and Fourteenth Amendments. App. 51a-53a. The Supreme Court denied the motion, without comment. App. 24a.

REASONS FOR GRANTING THE WRIT

At first glance, this case appears to involve just a misdemeanor conviction from a municipal court dealing with facts that occurred almost a decade ago. Yet, the facts that led to Ms. Dempére's arrest, trial and conviction are repeated every day throughout the United States. While the majority of police officers treat people with the utmost of respect, there has been a series of incidents of outrageous police misconduct which have attracted much publicity (Rodney King, Abner Louima, Amadou Diallo). The proliferation of cameras in smaller and smaller sized instruments (such as cell phones) increases the ability of bystanders to record perceived police misconduct. In response, those police officers who view onlookers with suspicion will attempt, as they did in Ms. Dempére's case, to insulate their actions from public scrutiny, especially if they are acting illegally in the first instance.

The issue presented by this case is at what point the police have the power to arrest an onlooker for "obstruction" when the onlooker merely verbally challenges illegal police behavior. Can a person who verbally challenges illegal police behavior be constitutionally convicted of "obstruction" even if her words actually interfere with the

ability of an officer to violate a third-party's constitutional rights?

In *Houston v. Hill*, *supra*, this Court assumed, without holding, that Justice Powell was correct that a person could be constitutionally punished for standing near a police officer and "persistently attempt[ing] to engage the officer in conversation while the officer is directing traffic at a busy intersection" or by shouting and running beside an officer pursing a felon. 482 U.S. at 462 n.11. What concerned the Court was not "simply contentious speech, but rather the possibility that by shouting and running beside the officer the person may physically obstruct the officer's investigation." *Id.* The Court's analysis appears to have assumed that the hypothetical officers were themselves acting lawfully. What the Court did not consider (in a pre-Rodney King era) was the situation where police behavior is blatantly illegal and a bystander attempts to interfere with police misconduct by shouting at the officers.

Ms. Dempére's case presents that very issue for this Court to resolve – whether a bystander whose speech actually interferes with illegal police behavior can be constitutionally convicted of a crime? The Washington courts' resolution of this important federal question conflicts with *Houston v. Hill*'s spirit and intent, if not the holding of the case. Moreover, the Washington courts' treatment of Ms. Dempére's case conflicts with the decisions of other state courts of last resort and other United States courts of appeal. This Court should therefore grant the petition under Rule 10(b) & (c).